

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

FLIPBOARD, INC., a Delaware corporation,	)	Case No. 5:15-cv-03255-BLF
	)	
Plaintiff,	)	<b>DECLARATION OF DAVID CREEMER</b>
	)	<b>IN OPPOSITION TO DEFENDANT'S</b>
	)	<b>MOTION TO DISMISS</b>
v.	)	
	)	Motion Filed: September 21, 2015
	)	Hearing Date: November 12, 2015
KALLIOPE AMORPHOUS, a/k/a	)	Hearing Time: 9:00 a.m.
MICHELLE WALSH, an individual,	)	Courtroom: 3 – 5th Floor
	)	The Honorable Beth Labson Freeman
Defendant.	)	
	)	

I, David Creemer, declare as follows:

1. I am Head of Platform Engineering at Flipboard, Inc. ("Flipboard") and have been employed by Flipboard since July 2010. In this role, I direct all platform (server) software engineering. I respectfully submit this declaration in opposition to Defendant Kalliope Amorphous' Motion to Dismiss. I have personal knowledge about the facts described below and, if called as a witness, could and would testify competently thereto.

2. Flipboard is a Delaware corporation with its principal place of business at 214 Homer Avenue, Palo Alto, California 94301. Founded in 2010, Flipboard operates a popular online service accessible at [www.flipboard.com](http://www.flipboard.com) and through various mobile application platforms, including Apple iOS and Android.

3. Flipboard's service gives users the ability to view content from around the Internet in interactive and attractive layouts in which content appears as though in a magazine.

4. Flipboard operates its service with respect for the rights of content creators. Flipboard has partnered with all types of global content companies including leading news services, publishers, social networks, photographers and galleries, newspapers and magazines, film studios, blogs and more.

1           5. Pursuant to these relationships, some of the content that is accessible on and  
2 through Flipboard is stored on Flipboard's systems and made available to users pursuant to  
3 licenses from rightsholders.

4           6. Other content accessible via Flipboard is uploaded to the service at the direction  
5 of its users. Flipboard stores or "hosts" that content and makes it accessible to users in  
6 accordance with the relevant safe harbor provision of the Digital Millennium Copyright Act, 17  
7 U.S.C. § 512(c).

8           7. Still more content accessible through Flipboard is not stored on, copied to, or  
9 served from Flipboard's system at all, but instead resides on third-party websites that Flipboard  
10 links to or "frames" via in-line links. When content is framed in this manner, the material is  
11 served and viewed by users from the third-party's website, not from Flipboard's. Flipboard's  
12 service simply links to and puts a frame around the material. In linking to content on other  
13 services' systems in this way, Flipboard acts in accordance with the relevant safe harbor  
14 provision of the Digital Millennium Copyright Act, 17 U.S.C. § 512(d).

15           8. Flipboard has entered into agreements with various online service providers under  
16 which it accesses content that those services store/host, in order to make that content viewable by  
17 Flipboard users. Under these agreements, other services provide Flipboard with information  
18 about the content stored on their systems, along with links to that content through what are  
19 known as application programming interfaces ("APIs"). Flipboard has entered into such API  
20 agreements with Flickr and Tumblr. Pursuant to these agreements, Flipboard is authorized to  
21 access content posted on Flickr and Tumblr and make that content accessible to Flipboard users.  
22 Flipboard accesses Flickr and Tumblr's APIs from its systems in Palo Alto.

23           9. I understand that Ms. Amorphous claims that Flipboard "scraped" (that is, copied  
24 and stored) images she posted on Flickr and/or Tumblr. That is incorrect. Flipboard never  
25 scraped or otherwise copied images from Ms. Amorphous' accounts on those services. The only  
26 access that Flipboard offered its users to any material from Ms. Amorphous' Flickr or Tumblr  
27 accounts was by framing links to such material (using the process described above) pursuant to  
28 the API agreements that Flipboard entered into with those services. Even then, however,

1 material from Ms. Amorphous' Flickr and Tumblr accounts would only have been framed by  
2 Flipboard in response to an action taken by some Flipboard user. The images from Flickr and/or  
3 Tumblr that users caused to be framed in this way were not copied to, stored on, or displayed  
4 from Flipboard's servers or systems.

5 10. In connection with this case, Ms. Amorphous has also claimed that Flipboard used  
6 images that she posted to the Bored Panda website. According to our records, none of those  
7 images accessed from Bored Panda was ever copied to or stored on Flipboard's system. Instead,  
8 the images were "framed" using the process described above.

9 11. In particular, the images from Bored Panda that were included in a Flipboard  
10 collection or "magazine" called "The Shot" at all times remained on the Bored Panda website,  
11 and they were only ever served from that website. The process for making them accessible as  
12 part of "The Shot" involved the presentation of the images on Bored Panda's website in a frame  
13 on the Flipboard service.

14 12. Flipboard's service is governed by its Terms of Use. In order to access and use  
15 the Flipboard service, a user must first create a Flipboard account, which requires the user to  
16 review and agree to Flipboard's Terms of Use. In addition, a copy of Flipboard's Terms of Use  
17 is posted prominently on Flipboard's website: <https://about.flipboard.com/terms>. Flipboard's  
18 Terms of Use make clear that they are governed by the laws of the State of California. In  
19 addition, the Terms of Use require users to agree that any judicial claims between Flipboard and  
20 its users will be litigated "exclusively in a state court located in Santa Clara County, California  
21 or in the United States District Court for the Northern District of California[.]" By accepting the  
22 Terms of Use, moreover, the user expressly consents to "personal jurisdiction in those courts."  
23 A true and correct copy of Flipboard's Terms of Use is attached hereto as Exhibit A.

24 13. I have reviewed Exhibits K, L, M, O, and P to Ms. Amorphous' Complaint  
25 against Flipboard in the Southern District of New York. A true and correct copy of those  
26 exhibits is attached hereto as Exhibit B. From these materials, it is clear that Ms. Amorphous  
27 created an account on the Flipboard service. These exhibits to her New York Complaint could  
28 only have been created by someone with a Flipboard account. Ms. Amorphous could not have

1 signed up for a Flipboard account, or used that account to access and use the Flipboard service  
2 and generate those screenshots, without first agreeing to Flipboard's Terms of Use, including the  
3 provisions of those terms requiring all claims with Flipboard to be litigated in the Northern  
4 District of California and consenting to personal jurisdiction in California.

5 I declare under penalty of perjury pursuant to 28 U.S.C. § 1746 that the foregoing is true  
6 and correct.

7  
8 Executed on October 13, 2015, 2015 in Palo Alto, CA.

9  
10 By:   
11 David Creemer